The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System

I. OVERVIEW

Four villages located in the northwestern corner of the Northern Cape Province of South Africa, part of the larger region formerly known as Little Namaqualand comprised the Richtersveld community.[1] Long before the annexation of this land to the British Crown in December 1847, and even before the Dutch colonization of the Cape in the seventeenth century, the Richtersveld people and their descendants occupied the entire Richtersveld community.[2] After the annexation of the Richtersveld to the British Crown, the Richtersveld people continued to enjoy "exclusive beneficial occupation" of the area until the mid-1920s.[3]

---

1. Richtersveld Cmty. v. Alexkor Ltd., 2003 (6) BCLR 583, paras. 2, 14 (SCA), *available at* http://wwwserver.law.wits.ac.za/sca/files/48801/48801.pdf (last visited Feb. 14, 2004) [hereinafter *Richtersveld II*].

2. *Id.* para. 14. The present Richtersveld population descends from the Nama people, who are thought to be a subgroup of the Khoi people. These people were a "discrete ethnic group" who "shared the same culture, including the same language, religion, social and political structures, customs and lifestyle." *Id.* paras. 15, 18. The primary rule of these people was that the land of their territory belonged to their community as a whole. *Id.* para. 18. Members of the community had exclusive access to the land. *Id.* Outsiders needed express permission to use the land usually for a fee. *Id.*

3. *Id.* para. 67:

In the mid-1920s, people in the Richtersveld region discovered diamonds. This led the government of the Republic of South Africa to grant diamond-mining contracts.[4] Little by little, the government dispossessed the Richtersveld people of their lands until finally in 1994, the government granted ownership of the subject land[5] to the company Alexkor Limited, the first Appellee.[6]

The Richtersveld community brought suit in the Land Claims Court[7] contending that the government had dispossessed them of their land and demanding restitution of a right in land under section 2(1) of the 1994 Restitution of Land Rights Act (Act).[8] The Land Claims Court dismissed the case and held that although the Richtersveld community "held a right in the subject land based on 'beneficial occupation for a continuous period of not less than 10 years' before the dispossessions," the annexation of the Richtersveld region to the British Crown in 1847

> "[R]ight in land" means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 year prior to the dispossession in question.

Restitution of Land Rights Act, No. 22, § 1(xi) (1994).

4. *Richtersveld II*, (6) BCLR 583, paras. 2, 92. The government of the Republic of South Africa is the second appellee in this case. Proclamation 58 of 8 March 1928 established the diamond-mining contracts (also called alluvial diggings) "which declared a portion of the subject land in the vicinity of Alexander Bay to be a state alluvial digging." *Id.* para. 92. This proclamation considered the subject land "'unalienated Crown land.'" *Id.* Proclamation 1 of 3 January 1929, Proclamation 250 of 17 July 1931, and Proclamation 158 of 7 June 1963 extended the alluvial diggings until they covered the whole subject land. *Id.*

5. The subject land is a narrow strip of land running more than 120 kilometers along the west coast of the Richtersveld from the mouth of the Gariep River in the north to just below Port Nolloth in the south (but excluding the Port Nolloth area). *Id.* para. 2.

6. *Id.* para. 95. Alexkor Limited, the first Appellee, is a company in which the sole shareholder is the government of the Republic of South Africa, the second Appellee. *See* Laboni Amena Hoq, Note, *Land Restitution and the Doctrine of Aboriginal Title:* Richtersveld Community v Alexkor Ltd and Another, 18 S. AFR. J. HUM. RTS. 421, 423 (2002).

7. The Land Claims Court decision is reported as *Richtersveld Community v. Alexkor Ltd.*, 2001 (3) SA 1293 (LCC), *available at* http://wwwserver.law.wits.ac.za/lcc/files/richtersveld2/richtersveld2.pdf (last visited Feb. 14, 2004) [hereinafter *Richtersveld I*]. The post-Apartheid government founded the Land Claims Court in 1994 specifically to adjudicate the claims of black South Africans dispossessed of their land under the Apartheid government after 1948. *See* FED. RESEARCH DIV., LIBRARY OF CONGRESS SOUTH AFRICA: A COUNTRY STUDY 164, 188-89 (Rita Byrner ed., 1996).

8. *Richtersveld II*, (6) BCLR 583, para. 1; *see* Restitution of Land Rights Act, No. 22, § 2(1)(d) (1994): "A person shall be entitled to enforce restitution of a right in land if—. . . it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices." *Id.* The government chose June 19, 1913, because this was the date of the passage of the Natives Land Act 27 of 1913, which is known as one of the "pillars of apartheid," laying the foundation for systematic racial segregation. T.W. Bennett & C.H. Powell, *Aboriginal Title in South Africa Revisited*, 15 S. AFR. J. HUM. RTS. 449, 450 (1999).

extinguished any right that these people may have held.[9] The Land Claims Court also held that any subsequent dispossession of rights that the Richtersveld people may have held in the subject land was not the result of "'past racially discriminatory laws or practices'" as required for restitution under the Act.[10]

The Richtersveld community appealed to the Supreme Court of Appeal contending that in addition to the "right to beneficial occupation for 10 years" found by the Land Claims Court, the community possessed, prior to June 19, 1913, the right to occupation, the right to exclusive beneficial occupation and use, or the right to use the subject land for certain specified purposes.[11] The community asserted that either (1) it possessed these rights under its own indigenous law that was extended to the common law of the Cape Colony after the annexation of the Richtersveld, or (2) it possessed these rights under its own indigenous law, constituting "customary law interests" leading to "rights in land" under the Act, even if the Cape Colony common law did not recognize the rights.[12] The Supreme Court of Appeal *held* that the Richtersveld community had a "right in land" through a customary-law interest and thus is entitled to restitution of the right to "exclusive beneficial occupation and use" of the land, including all minerals and precious stones, based on their dispossession through racially discriminatory means. *The Richtersveld Community & Others v. Alexkor Ltd.*, 2003 (6) BCLR 583 (SCA).

II. BACKGROUND

The Restitution of Land Rights Act of 1994 reflects South Africa's dedication to ridding the nation of one of the most unfair effects of the apartheid regime, the deprivation of land, as well as its "effort to redistribute this resource along pragmatic lines."[13] The government

---

9. *Richtersveld II*, (6) BCLR 583, para. 7; *see Richtersveld I*, (3) SA 1293, para. 65. The Land Claims Court held that the Richtersveld people were not considered to have a sufficient degree of civilization to warrant recognition by the British Crown. Therefore the British colonial government assumed sovereignty and ownership of the entire Namaqualand (including the Richtersveld area), which it viewed as being *terrae nullius*. *Richtersveld I*, (3) SA 1293, para. 37.

10. *Richtersveld II*, (6) BCLR 583, para. 7 (citations omitted). The Land Claims Court relied on its earlier decision in *Minister of Land Affairs v. Slamdien*, (1999) 1 All SA 608 (LCC), para. 26 (holding that the Restitution of Land Rights Act was meant to address only "those laws and practices which discriminated against persons on the basis of race in the exercise of rights in land" in order "to achieve the (then) ideal of spatial apartheid").

11. *Richtersveld II*, (6) BCLR 583, para. 10.

12. *Id.* para. 11.

13. Hoq, *supra* note 6, at 422.

enacted the Act to give effect to provisions in the Interim Constitution of 1994 that provided for

> restitution pursuant to any dispossession of rights in land if such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in [section] 8(2) [of the Interim Constitution], had that section been in operation at the time of such dispossession.[14]

As originally enacted, section 2 of the Act created the statutory right to restitution by paralleling the language used in section 121(2) of the Interim Constitution.[15] Section 25(7) of the Constitution of 1997 "widened the right to restitution for any dispossession 'as a result of past racially discriminatory laws or practices.'"[16] The legislature later amended section 2(1) of the Act to reflect this widening of the right to restitution.[17]

The rights in land recognized by the Act include

> *any right in land* whether registered or unregistered, and *may include* the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.[18]

This definition offers restitution claimants ample opportunity to claim a right in land.[19]

A. "Customary Law Interest" as a Right in Land

South African law recognizes customary law as binding precedent[20] and therefore recognizes all rights that customary law grants.[21] Custom is a part of the Roman-Dutch and English system of laws, both of which influence present-day South African law because of the area's history

---

14. *Richtersveld II*, (6) BCLR 583, para. 101; *see* S. AFR. CONST. (Interim Constitution of 1994) ch. 8, § 121(2)(b).

15. *Richtersveld II*, (6) BCLR 583, para. 101.

16. *Id.* para. 102 (quoting S. AFR. CONST. (Constitution of 1997) ch. 2 (Bill of Rights), § 25(7)).

17. *Id.* Section 3 of Act 63 of 1997 amended section 2(1) of the Act.

18. Restitution of Right in Land Act, No. 22, § 1(xi) (1994) (emphasis added).

19. *See Richtersveld II*, (6) BCLR 583, para. 9; Hoq, *supra* note 6, at 431.

20. *See* H.R. HAHLO & ELLISON KAHN, THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND 303 (1968).

21. *See* S. AFR. CONST. (Constitution of 1997) ch. 2 (Bill of Rights), § 39(3) ("The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.").

with both countries.[22] The English law maintains that a custom must have four essential attributes to be valid: (1) it must be immemorial (must have been in existence from a time preceding the memory of man, a date fixed at 1189 AD); (2) it must be reasonable; (3) it must be certain; and (4) it must have continued as a right and without interruption since its immemorial origin.[23] Roman-Dutch law is practically the same, except it only requires the custom to be an old one.[24] South African law has synthesized the views on custom of these two legal systems and established that a South African custom must be certain, uniformly observed for a long time, and reasonable to be valid.[25]

Courts in British settlements have applied local customary law to uphold the land rights of indigenous inhabitants for some time.[26] In the West African Gold Coast Colony, British tribunals applied customary land law in deciding indigenous land rights cases.[27] The application of customary law to lands within the colony implies that this customary law land right survived the acquisition of sovereignty and the subsequent development of English law.[28] The Privy Council has implicitly affirmed this concept in decisions involving Gold Coast Colony lands held by customary land rights, in which traditional evidence (witnesses speaking on the oral history of the colony and testifying about holders of land in past times) was used to prove title.[29]

The British courts in New Guinea also upheld customary law land rights that survived annexation to the Crown.[30] Discussing the people native to the portion of New Guinea known as Papua, the court in *Administration of Papua v. Daera Guba* stated that "'the title of the Papuans whatever its nature according to native custom was confirmed in them expressly by legislative acts.'"[31] The court suggested that the Crown respected local customs relating to the land (and the rights held under those customs) and indirectly confirmed the title of the Papuans by

---

22. *See* Van Breda v. Jacobs, 1921 A.D. 330, 334 (S. Afr.).

23. 6 LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND 12(1) para. 606 (4th ed. 1991).

24. *Van Breda*, 1921 A.D. at 334.

25. *Id.* at 334-37; *see* T.W. BENNETT, THE APPLICATION OF CUSTOMARY LAW IN SOUTH AFRICA: THE CONFLICT OF PERSONAL LAWS 40-49 (1985).

26. *See* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 183-91 (1989).

27. *Id.* at 129 n.93 (citing Stool of Abinabina v. Chief Kojo Enyimadu, (1953) A.C. 207).

28. *Id.* at 184.

29. *Id.* at 184 n.90 (citing Angu v. Attah, (1916) PC Gold Coast 1874-1928, 43; Effuah Amissah v. Effuah Krabah, (1936) 2 WACA 30; Kwamina Kuma v. Kofi Kuma, (1938) 5 WACA 4).

30. *Id.* at 185; *see, e.g.,* Administration of Papua v. Daera Guba, (1973) 130 C.L.R. 353.

31. MCNEIL, *supra* note 26, at 185 (quoting *Administration of Papua*, 130 C.L.R. at 397).

assuming that those pre-existing land rights had continued under English rule.[32]

Proof of customary land law did not present difficulties in territories such as those described above, where courts always accepted the application of customary land law to indigenous inhabitants.[33] However, in territories where there is a lack of judicial history in this area, the difficulty of proving customs may be overwhelming; it may be impossible to determine in the present whether or not indigenous people had a "customary system of tenure" at the time of the Crown's acquisition of sovereignty over the land inhabited by them.[34]

In re Southern Rhodesia presents another difficulty faced by indigenous people claiming customary law interests in land.[35] Differences in the usage and conceptions of rights between fully civilized societies and less socially organized tribes are difficult to reconcile.[36] Courts have not applied this principle universally, and the Australian case *Mabo v. Queensland* rejected it because it "depended on discriminatory denigration of indigenous inhabitants, their social organisation and customs."[37]

B. Aboriginal Title as a Right in Land

Aboriginal title is a right to land vested in "a community that occupied the land at the time of colonisation."[38] Jurisprudence describes it as "the creature of traditional laws and customs,"[39] based on the title of occupancy founded by natural law.[40] Many countries, including Australia, Canada, and England, recognize the doctrine as a legitimate right to land similar to the common law notions of occupancy and ownership.[41] However, the doctrine of aboriginal title is different from

---

32. *Id.* at 185-86 (discussing *Administration of Papua*, 130 C.L.R. 353).

33. *Id.* at 193; *see, e.g.*, Stool of Abinabina v. Chief Kojo Enyimadu, (1953) A.C. 207 (Gold Coast Colony); *Administration of Papua*, 130 C.L.R. 353.

34. MCNEIL, *supra* note 26, at 193.

35. *In re* Southern Rhodesia, (1918) A.C. 211 (Eng.).

36. *Id.* at 233.

37. Mabo v. Queensland [No 2], (1992) 66 A.L.J.R. 408, 421 (Austl.).

38. Bennett & Powell, *supra* note 8, at 449.

39. Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) H.C.A. 58, para. 103 (Austl.) (unreported High Court decision).

40. MCNEIL, *supra* note 26, at 205 ("The law of occupancy, it has been said, is founded on the law of nature. An argument can therefore be made that even before the Crown acquired sovereignty and English law applied, indigenous people would have had a natural law right to lands occupied by them." (footnotes omitted)).

41. *See, e.g.*, Mabo v. Queensland [No 2], (1992) 66 A.L.J.R. 408 (Austl.); Calder v. Attorney-Gen. of British Columbia, [1973] 34 D.L.R. (3d) 145 (Can.); Amodu Tijani v. The Sec'y, S. Nig., (1921) 2 A.C. 399 (Eng.).

the common law concept of ownership of property in that it is considered *sui generis*.[42] Several other characteristics distinguish common law property rights from aboriginal title:

> "[A]lthough the latter is enforceable in the ordinary courts, it is not protected from extinguishment by legislative act; it is not an individual proprietary right but rather a communal right vesting in an aboriginal people; [it is] . . . inalienable to anyone except the Crown or state government. . . . [I]t originate[s] in pre-colonial systems of indigenous law."[43]

1. Canada

The initial case recognizing aboriginal title in Canada is the Privy Council's decision, *St. Catherine's Milling and Lumber Co. v. The Queen*, which described aboriginal title as a "personal and usufructuary right."[44] However, this definition is unhelpful, thus the Canadian courts have held that aboriginal title is a *sui generis* interest in land—it is distinguishable from normal proprietary interests, and neither references to the common law rules of real property nor the rules of property found in aboriginal legal systems can explain its characteristics.[45]

In *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, the court developed four elements that plaintiffs must prove to establish an aboriginal title cognizable at common law:

(1) That they and their ancestors were members of an organized society;
(2) That the organized society occupied the specific territory over which they assert the aboriginal title;
(3) That the occupation was to the exclusion of other organized societies;
(4) That the occupation was an established fact at the time England asserted sovereignty.[46]

Delgamuukw v. British Columbia developed this test even further by providing the following criteria: "(i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive."[47] "[T]he intention and capacity to retain

---

42. *See, e.g.*, *Mabo*, 66 A.L.J.R. at 443.
43. Bennett & Powell, *supra* note 8, at 462 (footnotes omitted).
44. St. Catherine's Milling & Lumber Co. v. The Queen, [1988] 14 A.C. 46, 54 (Can.).
45. Delgamuukw v. British Columbia, [1997] 153 D.L.R. (4th) 193, 241 (Can.).
46. Hamlet of Baker Lake v. Minister of Indian Affairs & N. Dev., [1979] 107 D.L.R. (3d) 513, 542 (Can.).
47. *Delgamuukw*, 153 D.L.R. at 253.

exclusive control" can demonstrate exclusivity of occupation.[48] The test to establish exclusive occupation must take into account the uniqueness and peculiarities of the aboriginal society at the time of acquisition of sovereignty.[49]

According to Canadian aboriginal title jurisprudence, there exists a difference between aboriginal rights and aboriginal title.[50] Aboriginal rights fall along a spectrum according to their degree of connection with the land:

> At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. . . . In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. . . .
>
> . . . .
>
> At the other end of the spectrum, there is aboriginal title itself. . . . This confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself.[51]

2. England

Aboriginal title in England grew out of a necessity to recognize land rights of indigenous people, while still keeping in spirit with the necessity of English law title.[52] Because English law would not apply to the indigenous people until the Crown acquired sovereignty over their lands, they would not have an English law title by occupancy without aboriginal title.[53] Instead, they would be in occupation of lands presumed by the Crown to be unowned at the time of sovereignty.[54] Aboriginal title solved this problem and allowed for a presumptive title through possession, arising from the possession that English law would attribute to the indigenous occupiers at the moment the Crown acquired a

48. MCNEIL, *supra* note 26, at 204.
49. *Delgamuukw*, 153 D.L.R. at 258.
50. *See* R. v. Adams, [1996] 138 D.L.R. (4th) 657, 666-68 (Can.).
51. *Delgamuukw*, 153 D.L.R. at 251-52.
52. *See* MCNEIL, *supra* note 26, at 206.
53. *Id.*
54. *Id.*

territory.[55] Proof of a *jus tertii* or Crown ownership rebuts a presumptive title.[56]

Under English law, occupation is a matter of fact depending on physical presence on or control over land; this differs from possession, a conclusion of law.[57] Because possession is a matter of law, indigenous people may not have "possessed" their own lands because they may not have had an established system of law.[58] However, they could have held the land through occupation, because it is a matter of fact independent of systems of law.[59] If the indigenous people occupied the land at the time of acquisition of British sovereignty, the English law would grant them possession, absent proof that possession should be granted to another.[60] In order to be in "occupation," the indigenous people had to prove that they were in "exclusive physical control of land . . . with an intention . . . to hold or use it for [their] own purposes."[61] The degree of necessary control was dependent on "the nature, utility, value, and location of the land, and the conditions of life, habits, and ideas of the people living in the locality."[62]

Whenever the radical or ultimate title to land, and therefore the sovereignty, were ceded to the Crown, usually the Crown applied the principle of respect for the rights of indigenous inhabitants of the property.[63] In *Sobhuza II v. Miller*, the Crown compared this principle to a usufructuary right, a burden on the radical or ultimate title of the sovereign.[64]

3. Australia

In 1992, the court in *Mabo v. Queensland* accepted that indigenous Australians had common law rights to land, the first such acceptance since European settlement 204 years earlier.[65] The High Court held that indigenous Australians had a sufficient system of laws and customs and a relationship to the land recognizable by the common law that had

55. *Id.* at 207-08.
56. *Id.* at 207.
57. *Id.* at 197.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 201.
62. *Id.*
63. Amodu Tijani v. Sec'y, S. Nig., (1921) 2 A.C. 399, 407 (Eng.).
64. Sobhuza II v. Miller, (1926) A.C. 518, 525 (Eng.).
65. *See* Mabo v. Queensland [No 2], (1992) 66 A.L.J.R. 408, 421, 429 (Austl.).

survived the acquisition of sovereignty by the Crown.[66] Upon acquisition of sovereignty, radical or ultimate title became vested in the Crown, but was burdened by a title to land vested in the indigenous inhabitants.[67] Native title law is an important development in Australia because it recognizes and protects aboriginal identity, a concept the area had forgotten.[68]

Mabo pressed the legislature to provide an administrative framework for claiming this new common law right and for balancing its relationship with other interests in land.[69] In 1993, the legislature enacted the Native Title Act (NTA).[70] The NTA "provides a mechanism for indigenous communities to make claims to title, confirms the effect of past dispossession, and provides a means for the negotiation of future development of land which is subject to a native title claim."[71] However, the conservative Liberal and National Party made many changes to the NTA after they entered into office in 1996.[72] These changes and amendments made it more difficult to establish native title and opened "the possibility for state-based legislative schemes to replace the national native title regime."[73]

C. Survival of Rights in Land After Acquisition of Sovereignty

In colonial times, conquest or cession could effect acquisition of sovereignty over new lands if natives inhabited the lands, as could occupation or settlement if they were uninhabited.[74] The fiction that even if people occupied the territory, if the level of civilization of its occupiers was inadequate, it could be acquired by occupation or settlement as if it were uninhabited and therefore *terrae nullius* served as the basis for the

---

66. *Id.*; Alexander Reilly, *The Australian Experience of Aboriginal Title: Lessons for South Africa*, 16 S. AFR. J. HUM. RTS. 512, 515 (2000).

67. *Mabo*, 66 A.L.J.R. at 429. The court called this title belonging to the indigenous inhabitants "native title" and Justice Brennan explained this by describing "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants." *Id.*

68. Reilly, *supra* note 66, at 513. The Europeans settled Australia in 1788, yet aboriginal Australians did not receive the right to vote until 1962 and the Australian Constitution did not recognize them until 1967. *Id.* at 512-13.

69. *Id.* at 512; *see* Native Title Act, 1993 (Austl.).

70. *See* Native Title Act, 1993 (Austl.).

71. Reilly, *supra* note 66, at 517; *see* Native Title Act, 1993 (Austl.). The actual details of native title have been left to the common law. Reilly, *supra* note 66, at 517.

72. Reilly, *supra* note 66, at 518.

73. *Id.* "Western Australia has already drafted legislation that replaces the current claims process with a State-based alternative." *Id.* at 518 n.33.

74. LORD HAILSHAM OF ST. MARYLEBONE, *supra* note 23, para. 978.

notion of occupation or settlement.[75] International law has been split over the acquisition of sovereignty and its effect on private property rights held under local, customary, or aboriginal law before the acquisition.[76] Two theories emerged in response to this controversy: the doctrine of recognition and the doctrine of continuity.[77]

The doctrine of recognition stands for the principle that upon acquisition of sovereignty by any means, only those rights recognized by the Crown would be judicially enforceable.[78] All others, including native rights to land, would be void.[79] The Indian Appeals case, *Vajesingji Joravarsingji v. Secretary of State for India*, is the most frequently cited case as authority for this doctrine, especially the following passage:

> [W]hen a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing.[80]

Under this doctrine, the Crown upon acquisition usurped any rights in land possessed by indigenous inhabitants.[81] Only those rights in land recognized by the Crown would be valid in respect to claims of indigenous ownership of these lands.[82]

The doctrine of recognition has many flaws, which has led to its demise.[83] It violates international law by treating the Crown as presumptively seizing all private property upon acquisition of sovereignty; it thus goes against the common law presumption that the Crown respects international law; and it does not correspond with the British colonial law principle that local laws remain in force in both conquests and cessions

---

75. *See* MCNEIL, *supra* note 26, at 119-22 (discussing English and Australian colonies that many peoples inhabited at the time of occupation, but the colonizers generally regarded as unoccupied because of the lack of native civilization).

76. *Id.* at 161.

77. *See, e.g.*, Vajesingji Joravarsingji v. Sec'y of State for India, (1924) L.R. 51 I.A. 357, 360 (Eng.) (discussing the doctrine of recognition); *In re* S. Rhodesia, [1919] A.C. 211, 233 (1918) (Eng.) (discussing the doctrine of continuity).

78. MCNEIL, *supra* note 26, at 165-66.

79. *Id.* at 165.

80. *Id.* (quoting *Vajesingji Joravasingji*, 51 I.A. at 360).

81. *See Vajesingji Joravasingji*, 51 I.A. at 360.

82. *See id.*

83. *See* MCNEIL, *supra* note 26, at 176; Bennett & Powell, *supra* note 8, at 478-81.

until altered or replaced.[84] The International Court of Justice held in *Advisory Opinion on Western Sahara* that the British colonial practices indicate that "territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*," despite the doctrine of recognition's statement otherwise.[85]

Countering the doctrine of recognition is the doctrine of continuity, which states the presumption that private property rights continue after a change in sovereignty.[86] The majority of colonial decisions followed this doctrine of continuity, leading to its status as the dominant theory of present-day Anglo-American jurisprudence.[87] The English Privy Council case *In re Southern Rhodesia* stated in reference to indigenous land rights that "upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them."[88] *Amodu Tijani v. Secretary, Southern Nigeria* followed this principle, holding that the cession to the Crown did not affect the private communal land rights of the indigenous people under their local system of law because "[a] mere change in sovereignty is not to be presumed as meant to disturb rights of private owners."[89] The Australian court in *Mabo v. Queensland* analyzed this statement, noting that the court did not limit the change in sovereignty to only acquisitions by cession.[90]

The 1957 decision *Oyekan v. Adele* attempted to reconcile the inconsistencies of the doctrines of recognition and continuity.[91] The court acknowledged the doctrine of recognition, but held that when inquiring what rights to consider recognized, the guiding principle is that "[t]he courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected."[92] Despite this attempt at reconciliation of the contradictory doctrines, later decisions and analyses have shown that the international community considers the doctrine of continuity to be the "correct" doctrine.[93]

---

84. MCNEIL, *supra* note 26, at 176.
85. *Advisory Opinion on W. Sahara*, 1975 I.C.J. 12, 39 (Oct. 16).
86. MCNEIL, *supra* note 26, at 171.
87. Bennett & Powell, *supra* note 8, at 480.
88. *In re* S. Rhodesia, [1919] A.C. 211, 233 (1918) (Eng.).
89. Amodu Tijani v. Sec'y, S. Nig., (1921) 2 A.C. 399, 407 (Eng.).
90. Mabo v. Queensland [No 2], (1992) 66 A.L.J.R. 408, 428 (Austl.).
91. MCNEIL, *supra* note 26, at 175 (citing Oyekan & Others v. Adele, 2 All E.R. 785, 788 (1957) (Eng.).
92. *Oyekan*, 2 All E.R. at 788.
93. MCNEIL, *supra* note 26, at 175-79.

D. Dispossession and Racial Discrimination

The element of dispossession determines whether the Restoration of Right in Land Act entitles an aboriginal community to restitution of their land rights "as a result of past racially discriminatory laws or practices."[94] As defined by the Act itself, "racially discriminatory laws include laws made by any sphere or government and subordinate legislation."[95] "Racially discriminatory practices" are "racially discriminatory practices, acts or omissions, direct or indirect, by—(a) any department of state or administration in the national, provincial or local sphere of government; (b) any other functionary or institution which exercised a public power or performed a public function in terms of any legislation."[96]

In the 1998 case, *The Minister of Land Affairs of the Republic of South Africa v. Slamdien*, the Land Claims Court narrowed the statutory requirement of racially discriminatory laws or practices to "those laws and practices which discriminated against persons on the basis of race in the exercise of rights in land" in the furtherance of spatial apartheid.[97] Interestingly, the Court never addressed the underlying issue of what kinds of laws and practices would qualify for restitution under its narrow definition.[98] In *Slamdien*, the South African government took property from a black landowner in order to build a school for black children.[99] The Land Claims Court did not provide restitution for the black landowner, claiming that the dispossession did not racially discriminate against him as a landowner in the exercise of his rights in land, but instead it discriminated against the prospective pupils of the school.[100]

The Act does not limit the required racial discrimination to simply direct discrimination; it also provides for indirect racial discrimination.[101] *City Council of Pretoria v. Walker* discussed the burden against a plaintiff alleging indirect discrimination: "the protective purpose would be defeated if the persons complaining of discrimination had to prove not only that they were unfairly discriminated against but also that the unfair

---

94. Restitution of Right in Land Act, No. 22, § 2(1) (1994).
95. *Id.*
96. *Id.*
97. The Minister of Land Affairs of the Republic of S. Africa v. Slamdien, 1999 (1) BCLR 413, para. 26 (LCC), *available at* http://wwwserver.law.wits.ac.za/lcc/files/slamdien/slamdien.pdf (last visited Feb. 18, 2004).
98. Hoq, *supra* note 6, at 440.
99. *Slamdien*, (1) BCLR 413, paras. 32-33.
100. *Id.*
101. Restitution of Land Rights Act, No. 22, § 1 (1994).

discrimination was intentional."[102] Section 8(2) of the Interim Constitution of 1994, which led to the statutory right to restitution, implies nothing about proof of intention or motive.[103] Therefore, the Constitutional Court of South Africa held that the Constitution does not require proof of governmental or agency intention to discriminate in order to petition for restitution.[104]

III. THE COURT'S DECISION

In the noted case, the Supreme Court of Appeal of South Africa considered for the first time whether aboriginal title could be imputed from indigenous settlement and occupation of the subject land for purposes of restitution.[105] The court ultimately decided that the Richtersveld community held a "customary law interest" in the land, akin to the right in land held under common law ownership,[106] and that this "customary law interest" survived the annexation of the Richtersveld to the British Crown.[107] However, the court discussed at length the doctrine of aboriginal title and if it was compatible with South African common law.[108] Leaving open the future possibility of the establishment of aboriginal title, the court concluded, "In view of my conclusion that a customary law interest . . . has been established in the present case, . . . it becomes unnecessary to decide whether the doctrine forms part of our common law or whether our common law should be developed to recognise aboriginal rights."[109]

The court found that the Richtersveld community held a "customary law interest" in the land at the time of annexation,[110] and consequently a right in the land as defined by the Act. In doing so, the court identified a major flaw in the Land Claims Court decision.[111] Namely, in considering whether there existed a customary law interest in the subject land, the Land Claims Court considered whether at the time of dispossession "'there existed a custom which had become applicable law, in terms of which the State was obliged to recognise rights of the

---

102. City Council of Pretoria v. Walker, 1998 (3) BCLR 257, para. 43 (CC), *available at* http://www.concourt.gov.za/files/walker/walker.pdf (last visited Feb. 14, 2004).

103. *See* S. AFR. CONST. (Interim Constitution of 1994) ch. 3, § 8(2).

104. *Walker*, (3) BCLR 257, para. 43.

105. *See* Hoq, *supra* note 6, at 421.

106. Richtersveld Cmty. v. Alexkor Ltd., 2003(6) BCLR 583, para. 29 (SCA) (*Richtersveld II*).

107. *Id.* para. 61.

108. *See id.* paras. 36-43.

109. *Id.* para. 43.

110. *Id.* para. 29.

111. *Id.* para. 13.

first plaintiff over the subject land,'"[112] ultimately deciding that the Richtersveld community did not prove that any such custom regarding land rights had become applicable law.[113] According to authorities, such as *Van Breda v. Jacobs*, proof of a custom only required a showing that it is certain, uniformly observed for a long period of time, and reasonable.[114] Thus, probably after realizing that the uncontested facts of the noted case satisfied the precedential requirements for custom,[115] both Alexkor Limited and the South African government conceded during the argument in the Supreme Court of Appeal that the Richtersveld residents held a customary law interest under their indigenous customary law, akin to the common law right of ownership.[116] At the time of annexation, the Richtersveld people had enjoyed the exclusive occupation of the subject land for a long period of time without interruption through a right in the land stemming from their traditional laws and customs.[117] Both inhabitants and strangers knew of the right, respected and observed it, therefore making it certain and reasonable.[118] Therefore, the Richtersveld people properly held a "customary law interest" in the subject land, translating to a right for exclusive beneficial occupation and use.[119]

The Supreme Court of Appeal of South Africa held in the noted case that the Richtersveld maintained these rights in the subject land through the "customary law interest" after the annexation by the British Crown.[120] The court also found that the Land Claims Court erred in its finding that no indigenous land rights survived the annexation.[121] The Land Claims Court held that during the nineteenth century, the British colonial government regarded the Richtersveld as *terrae nullius* because of the lack of civilization of its people, and thus assumed sovereignty and full ownership of the entire Richtersveld area, including the subject land.[122] However, this finding of the Richtersveld region as *terrae nullius* is clearly erroneous, as the Richtersveld people possessed a "social and political organization" at *and* before the time of annexation and therefore could not have been annexed through occupation as *terrae nullius* under

---

112. *Id.* para. 25 (quoting Richtersveld Cmty. v. Alexkor Ltd. 2001 (3) SA 1293 (LCC), para. 48 (*Richtersveld I*).
113. *Richtersveld I*, (3) SA 1293, para. 48.
114. *Id.* para. 27; *see* Van Breda v. Jacobs, (1921) A.D. 330, 334.
115. *Richtersveld II*, (6) BCLR 583, para. 27.
116. *Id.* para. 26.
117. *Id.* para. 28; *see id.* para. 18.
118. *Id.* para. 28; *see id.* para. 18.
119. *Id.* para. 29.
120. *Id.* para. 61.
121. *Id.* para. 35.
122. *See Richtersveld I*, (3) SA 1293, paras. 37-41.

the standard set in *Advisory Opinion on Western Sahara*.[123] Also, the colonial government did not recognize the Richtersveld as being *terrae nullius* when the Crown annexed the region, as evidenced by the history of sales of indigenous property to the colonial government,[124] and the terms of the Articles of Capitulation that ended the hostilities between the British Crown and the Dutch Sovereign in 1806.[125] Both Alexkor Limited and the South African government expressly agreed that the Richtersveld region was sufficiently civilized, thus affirming the error of the Land Claims Court decision.[126] Therefore, the noted case is in accordance with the doctrine of continuity; the existing customary law interest in the Richtersveld land held by the indigenous people survived the annexation.[127]

The noted case also established that from the time of the annexation until the dispossession, the colonial government and the subsequent South African government (State) at all times recognized the Richtersveld community as a distinct entity occupying the entire Richtersveld region.[128] Until the mid-1920s, when people discovered diamonds on the land, the Richtersveld people exercised exclusive occupation of the area.[129] Non-Richtersveld people had to obtain permission before settling or grazing their animals in the region.[130] All during this time from annexation to dispossession, the people of the region expressly made claims to exclusive use and occupation of the region in correspondence with the colonial government and the State, who did not dispute these claims and consistently acknowledged the Richtersveld people's exclusive right of use and occupation of the region.[131]

Thus having declared the Richtersveld people to have possessed a "customary law interest" in the subject land that survived the annexation and the period of time leading up to the dispossession, the next step in deciding whether the people should be allowed restitution is to analyze the circumstances of the actual dispossession of the land.[132] Section 2(1) of the Act requires the dispossession to have either occurred "as a result

123. *See Richtersveld II*, (6) BCLR 583, paras. 44-46.
124. *Id.* para. 48; HAHLO & KAHN, *supra* note 20, at 568 n.8.
125. *Richtersveld II*, (6) BCLR 583, para. 49 (discussing Articles of Capitulation of 10 and 18 January 1806).
126. *Id.* para. 46.
127. *See id.* para. 61.
128. *Id.* para. 80.
129. *Id.* para. 67.
130. *Id.*
131. *Id.* paras. 68-69.
132. *See* Restitution of Land Rights Act, No. 22, § 2(1) (1994).

of past racially discriminatory laws or practices."[133] The noted case held that the Land Claims Court erred in finding that the government had not dispossessed the Richtersveld people because the laws and practices alleged to have been discriminatory were not aimed at furthering spatial apartheid.[134] The Land Claims Court thus required some motive or intent of the State not to recognize the rights of the Richtersveld people.[135] However, the Land Claims Court failed to note that the discrimination against the Richtersveld people was an indirect racial discrimination, which, according to *Pretoria City Council v. Walker*, requires no proof of State intent or motive to discriminate.[136] The Supreme Court of Appeal in the noted case analyzed the *Slamdien* case, which the Land Claims Court relied upon and found that the real *ratio legis* of the judgment in *Slamdien* was that "the Act limited restitution remedies to people who had been discriminated against in the exercise of their land rights," not the absence of spatial apartheid measures.[137] Therefore, whether the government or any of its actors discriminated against the Richtersveld people in the exercise of their land rights determines whether the court should allow them restitution.[138]

Ultimately, the court decided that the effect of the State policy since the 1920s regarding the Richtersveld region was that the government treated the Richtersveld people as if they had no rights in the subject land.[139] While acknowledging the occupation and use of the land of the Richtersveld people since before the annexation, the State has refused to recognize that the inhabitants have *any* rights to the land.[140] Although the State did not expressly give its reasoning for believing that the Richtersveld region became Crown land upon annexation, it was "obvious, albeit unexpressed" that the State believed the Richtersveld

---

133. *Id.*

134. *Richtersveld II*, (6) BCLR 583, para. 97 (citing *Richtersveld I*, (3) SA 1293, paras. 93, 114).

135. *Id.* para. 104.

136. *Id.* paras. 104-105 (citing *Walker*, (3) BCLR 257, para. 43).

137. *Id.* para. 99 (citing Hoq, *supra* note 6, at 442).

138. *See id.*

139. *Id.* para. 110.

140. *Id.* para. 107:

> For example, according to the minutes of the meeting of the Parliamentary Select Committee on Public Accounts on 3 April 1922 the Government's attitude was stated to be that the Richtersveld became Crown land upon annexation and, while the inhabitants' 'precarious occupation' was acknowledged, it was not accepted that they held any rights to the land.

Id.

people to be insufficiently civilized based on their race.[141] Thus the dispossession of the Richtersveld people of their rights in the subject land "resulted from a racially discriminatory practice in that it was based upon and proceeded from the premise that due to their lack of civilisation, to which their race was inextricably linked, the Richtersveld people had no rights in the subject land."[142]

The decision by the Supreme Court of Appeal entitled the Richtersveld community to restitution of the "right to exclusive beneficial occupation and use, akin to that held under common law ownership, of the subject land (including its minerals and precious stones)."[143]

IV. ANALYSIS

The Supreme Court of Appeal of South Africa decided correctly that the Richtersveld people had a customary law interest in the subject land.[144] For the Richtersveld people to prove the custom of their occupation and use of the land, they had to show that it was certain, uniformly observed for a long period of time, and reasonable.[145] Evidence presented at the Land Claims Court trial easily satisfied these requirements.[146] In analyzing the adequacy of the cultures of the Richtersveld people relating to the subject land, the Supreme Court of Appeal noted that the primary rule of this area was

> that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people.[147]

The defense presented many pieces of evidence in court to prove the custom that non-Richtersveld people needed permission to graze on the Richtersveld land.[148] The Richtersveld people knew these rules, as did all outsiders,[149] evidencing the certainty, uniform observation, and reasonableness of the customs relating to the land.

---

141. *Id.* para. 109.
142. *Id.* para. 110.
143. *Id.* para. 111.
144. *See* Van Breda v. Jacobs, (1921) A.D. 330, 334-37 (S. Afr.).
145. *Id.*; *Richtersveld II*, (6) BCLR 583, para. 27.
146. *Richtersveld II*, (6) BCLR 583, para. 28.
147. *Id.* para. 18.
148. *Id.*
149. *Id.* para. 28.

The Supreme Court of Appeal also correctly found that the State had dispossessed the Richtersveld people of their lands by racially discriminatory practices.[150] By expressly including indirect racial discrimination, the Restitution of Land Rights Act allows a remedy for peoples like the Richtersveld people, who had no express "proof" of government intent or motive to discriminate.[151] To the Richtersveld people and, more importantly, to the Supreme Court of Appeal of South Africa, it was obvious that the South African government discriminated based on racially discriminatory stereotypes and beliefs that the Richtersveld people were insufficiently civilized.[152] The recognition of indirect discrimination by the court will help future litigants successfully show their own dispossession through racially discriminatory practices; because prior to this decision, the Land Claims Court required a governmental intent or motive to discriminate.[153]

Although the Supreme Court of Appeal found that the Richtersveld people had a "customary law interest" in the land, the noted case presented an excellent opportunity for the court to have found that the Richtersveld people possessed an aboriginal title in the land.[154] Even though the noted case had sufficient evidence to prove the customs and traditions of the Richtersveld people, the court could have found that they possessed aboriginal title to the land as a result of their exclusive occupation of the land at the time of annexation.[155] This would have provided a precedent to allow other communities whom the State dispossessed of their land, and whose customs and traditions could not so easily be proven, to file a claim for restitution based on their occupation of the land.[156]

Alexkor Limited has appealed to the Constitutional Court of South Africa.[157] If the Constitutional Court does choose to introduce aboriginal title into South African law, there will be many benefits to the country's

---

150. *See id.* para. 110.

151. *See* Restitution of Land Rights Act, No. 22, § 1 (1994) (defining "racially discriminatory practices").

152. *See Richtersveld II*, (6) BCLR 583, paras. 107-109.

153. *See id.* para. 104 (concluding that the Land Claims Court required "a motive, an intent, a racist reason or conscious failure" of the government to recognize the Richtersveld people's rights in the land in order for the dispossession to qualify as being through racially discriminatory practices).

154. *See* Hoq, *supra* note 6, at 442-43.

155. *See Richtersveld II*, (6) BCLR 583, paras. 28-29, 37.

156. *See* Reilly, *supra* note 66, at 515; MCNEIL, *supra* note 26, at 193; Bennett & Powell, *supra* note 8, at 481-82.

157. *See* Alexkor Ltd. v. Richtersveld Cmty., No. 19/03 (CCT Sept. 4, 2003) (Hearing date: 4 September 2003), *available at* http://www.concourt.gov.za/summary.php?case_id=12632.

other dispossessed inhabitants.[158] Recognition of aboriginal title will lay to rest the issue of the status of a colonial territory as *terrae nullius*; an issue that has prevented many people from completing successful claims of restitution, as aboriginal title recognizes title based on occupation of the land whether or not it the State considers it *terrae nullius*.[159] Also, communities that were hunter-gatherer and herder societies can easily file claims for restitution under aboriginal title because "whenever weighing proof of occupation, a generous allowance is made for the nature of traditional socio-economic systems and local topography."[160] The introduction of capitalism, colonialism, and racial segregation have disrupted many communities' native cultures and patterns of landholding.[161] These communities can benefit from the aboriginal title's relaxation of the requirement of continuity in occupation and traditional systems of law.[162] This relaxation of requirements is especially important in communities where the potential witnesses to testify about past customs and traditional systems of law, usually the "elders," are slowly dying out.[163] One final benefit can be seen in the communities in Australia who have been successful in their claims of aboriginal title: a renewed interest in native laws and customs.[164] Communities are free to practice their traditional laws on land claimed through aboriginal title, which leads them to feel empowered to do so because "the practice of traditional laws and customs is a confirmation of the legitimacy of their title."[165]

There are, however, possible pitfalls to aboriginal title, as evidenced in the Australian experience. Trials to declare aboriginal title may actually perpetuate the colonialism that they seek to overcome, because the State usually uses "the history of dispossession and annihilation of their ancestors . . . to defeat [aboriginal] title claims and to cast doubt on the very possibility of the claimants' existence as indigenous peoples."[166] If the State defends successfully, their reliance on this history may misrepresent and overstate the destruction of aboriginal life, including traditional laws and customs.[167] Losing a claim of aboriginal title can

158. *See* Reilly, *supra* note 66, at 529-31; Bennett & Powell, *supra* note 8, at 481-85.
159. Bennett & Powell, *supra* note 8, at 482.
160. *Id.*; MCNEIL, *supra* note 26, at 202-04.
161. MCNEIL, *supra* note 26, at 202-04.
162. *Id.*
163. Reilly, *supra* note 66, at 529.
164. *Id.*
165. *Id.*
166. *Id.* at 532.
167. *Id.*

devastate a community because the judgment seems to trivialize their legal rights as well as their cultural integrity.[168]

Despite possible pitfalls, there is strong indication through comparative and international law that South African law can successfully incorporate aboriginal title.[169] The South African Constitution called for restitution of land rights in South Africa to benefit those communities whose land the State possessed through racially discriminatory means (communities that were usually indigenous to the land).[170] Because of the dilution of their indigenous customs and lifestyles through colonial annexation and dispossession, these communities may have difficulty claiming restitution under "customary law interest," even though they are the communities for whom the State enacted the Act to help.[171] Aboriginal title is the answer for these communities.

V. CONCLUSION

South Africa's recent constitutional past and the judiciary's aptness to right the wrongs of apartheid all point in the direction of the development of aboriginal title. The Supreme Court of Appeal of South Africa in the noted case hinted at the possibility of its introduction in the inevitable appeal to the Constitutional Court. Many communities in South Africa will finally receive compensation for the lands the State dispossessed them of, as well as the minerals and stones of those lands. Most importantly from a legal perspective, the South African government may possibly introduce amendments to the developing Constitution and the Restitution of Land Rights Act in order to recognize aboriginal title. The noted case is simply a stepping stone for these actions.[172]

Yvette Trahan*

---

168. *Id.*

169. Hoq, *supra* note 6, at 442.

170. *See* Richtersveld Cmty. & Others v. Alexkor Ltd., 2003 (6) BCLR 583, paras. 101-102 (SCA).

171. *See* MCNEIL, *supra* note 26, at 193; Bennett & Powell, *supra* note 8, at 482.

172. In *Alexkor Ltd. v. Richtersveld Community*, the Constitutional Court of South Africa upheld the Supreme Court of Appeal decision to provide restitution for the Richtersveld people. The Constitutional Court found that the Richtersveld people possessed "indigenous title" to the lands, a term similar to the "customary law interest" found by the Supreme Court of Appeal. Whether the South African legal system will develop this concept of "indigenous title" as "aboriginal title" remains to be seen in future litigation. Alexkor Ltd. v. Richtersveld Cmty., No. 19/03 (CCT Sept. 4, 2003), *available at* http://www.concourt.gov.za/summary.php?case_id=12632.

* J.D. candidate 2005, Tulane University School of Law; B.A. 2002, University of Texas-Austin.